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Federal Communications Commission
Office of the Secretary
Room 222
1919 M St., N.W.
Washington, D.C. 20554

Dear Secretary Salas:

Enclosed you will find ten original run copies from my printer which I would like to be distributed among FCC Commissioners so all may be able to have a set for their records. These comments are being filed in response to the NPRM in the implementation of Section 309 (j) of the Communications Act; MM Docket No. 97-234.

I have included an eleventh set which I would like to identify as being in response to the Initial Regulatory Flexibility Analysis. I would appreciate it if you could forward the extra copy to the proper office as I could find no address for this.

Thank you very much for your time and assistance.

Respectfully,


Michael R. Ferrigno

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Federal Communications Commission
Office of the Secretary
Room 222
1919 M St., N.W.
Washington, D.C. 20554

Dear Ladies and Gentlemen of the Federal Communications Commission:

This has been prepared in response to a Notice of Proposed Rulemaking in the matter of the implementation of Section 309 (j) of the Communications Act; MM Docket No. 97-234 and the announced period for the acceptance of public comment on this issue. I have gone through the task of preparing this by myself in my own defense in the hopes of providing some insight as to why some of these pending rules have the potential to cause great hardship to some individuals. I happen to be at least one of those who may be adversely affected by these proposed rules, and, although my case may be the exception rather than the rule, I would like to make you aware of some extenuating circumstances which do exist in my case and may or may not reappear in future cases.

I currently have a pending FCC Form 301 for a construction permit for a new FM broadcast station at Oakley, UT, (# 971119MB) at 101.5 MHz. This application was filed in timely fashion in response to a filing window that closed on 20 November, 1997. The issuance of this set of proposed rules significantly compromises my position in these proceedings for reasons which I hope to make clear to you through the course of this response.

In order for me to make my situation a little more clearly understood, it is important for a brief synopsis of the circumstances that will help explain how I found myself in this position.

I live in the small but rapidly growing ski community of Park City, UT, located approximately 30 miles outside the Salt Lake City area. Through the years I have been civically involved in one way or another. After moving to Park City in July, 1991, I became involved with the Parks, Recreation and Beautification Board and a local non-profit FM radio station as a volunteer DJ. After several years of listeners' inquiries as to why the station's format was what it was, it became apparent that the needs and wants of a significant portion of the listeners was not being met. Unfortunately for many this was the only local service they could receive on their radio. Even though we are within theoretical listening range of several of the Salt Lake stations, the local geography prevents those signals from reaching the area which results in virtually silent airwaves. I

heard from several locals regarding the fact that for the past 15 years everything had been tried and it was not possible to bring any other local radio to the area. After doing some preliminary work, I found I wanted to do a serious inquiry regarding the issue.

In January, 1996, I contacted Lawrence L. Morton Associates, a consulting telecommunications engineering firm and the law firm of Leventhal, Senter and Lerman in Washington, D.C., and began the necessary investigations. After doing several searches we found that although there was no suitable area in Park City to "drop-in" a frequency, there was a small neighboring community that met all the requirements necessary for the "drop-in" and also cover a more significant portion of the unserved adjacent area. Thus we began the process of having a frequency allocated to the community of Oakley, UT. Finally, with a release date of 5 September, 1997, was the FCC Report and Order that granted the allocation to Oakley, UT on channel 268C1. (In the matter of amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations; MM Docket No. 96-230, RM-8911, RM-9049)

As a result of the granting of the allocation, I was aware that FCC procedure was that it would do a public notice to announce a filing window to allow any interested parties to file an application for the construction permit for the station for which I had just spent 18 months' time and work to create. The risk of competing applications was one I was willing to take as I was told the strongest application should be awarded the Construction Permit. With Line-of Sight being one of the primary requirements for the transmitter's location, I made especially sure of the requirement being met by twice chartering a helicopter to verify that line-of-sight did, in fact, exist. Due to the very mountainous terrain of the area, I can attest that there is only one small area with this requirement met. As I had all the necessary research and engineering work done well ahead of time, I felt I would be in a good position to challenge any other competing applications, and with the same representation as the allocation proceedings, filed with and followed all instructions of FCC Form 301 for the C.P. .

After explicitly following all steps and requirements of the currently valid form, FCC 301, the last line I read prior to signing was: "I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith". Prior to signing, I had assumed that statements made on the application form by the FCC were also made in good faith and it is here that the proposed rules fly in the face of what was supposed to be the criteria used when filing with the proper FCC Form 301. As per paragraph F of the general instructions for FCC 301: "Replies to questions in this form and the applicant's statements constitute representations on which the FCC will rely in considering this application. Thus, time and care should be devoted to all replies, which should reflect accurately the applicant's responsible consideration of the questions asked. ...Defective or incomplete applications will be returned without consideration. ...". It is upon this paragraph that I based my whole strategy of being able to fight off any competition and the proposed rules signify a very serious deviation from the previous implications of methods with which I might be able to prevail in this case.

With this background in mind, I would like to offer comment on some of the pending proposals, how they might affect me and/or others and, when possible, offer a different point of view. Please be aware that my area of exposure has been that of the FM band and that most comments will be made from that aspect. Thank you in advance for taking the time to consider these comments.

PP 1: The use of competitive bidding to resolve mutually exclusive applications would function more fairly if it were used only as a last resort in the settlement in those cases in which the award of the construction permit could not be decided upon by a series of challenges amongst the mutually exclusive applicants on the merits of the various sections of FCC301. If, as part of a comparative hearing, merits of any part of the entire application form can be sited as faulty by any of the other mutually exclusive applicants and survive a challenge as to its being faulty, it should result in the disqualification of that applicant. FCC 301 has several sections that, if weighted equally, could advance to the point where any qualitative credits claimed in Section IV-B-Integration Statement Part 2 would be moot and the award of the construction permit would be to the one with the soundest application that survived any and all challenges by the other mutually exclusive applicants.

PP 2: If one of the primary objectives of the FCC is to insure "maximum diffusion of control of the media of mass communications", the switch to an auction-based method of awarding construction permits will ultimately result in the elimination of the small entity in the mass media field.

PP 3: Comparative hearings can be cumbersome and the selection process has been allowed to turn on minimal distinctions, but if policy as stated in Paragraph F of General Instructions for FCC 301, "defective or incomplete applications will be returned without consideration" were enforced, any error on the form would result in a disqualification. If, as part of the proceedings toward the award of the C.P., I was able to challenge any one part of the other mutually exclusive applications, I would be able to eliminate all of the other applications. These challenges could be based on such requirements as line-of-sight, which in mountainous terrain cannot be assumed; acquisition of site from owner where in cases like mine there is only one owner on whose land the line-of-sight requirement can be met; technical inaccuracies in the engineering data submitted as part of FCC 301; satisfactory completion of all public notice requirements; ability to meet financial obligations necessary to complete the project; timely submission of an application in response to a filing window.

PP 6: "The commission must grant the license or permit to a qualified applicant through a system of competitive bidding." If being a qualified applicant meant that the application had survived all challenges from any or all of the other mutually exclusive applicants, there would be a significant reduction in the number of cases with which the FCC would have to deal. Allow a line by line challenge of an application by any of the other mutually

exclusive applicants. If any aspect of an application is not able to survive a challenge, it should disqualify that application.

PP 7: The date of July 1, 1997 has the potential to create great hardship in that it does not address what happens to those whose cases arose between that date and the date on which the proposed set of rules is finally adopted. If this Notice of Proposed Rulemaking was only released on November 26, 1997, how was one who applied prior to this notice able to know that he was bound to operate under a set of rules that was not even proposed at that point? The proper form to file for a C.P. when I filed was FCC 301 and I expected that I would be bound to the instructions and qualifications of that form as the instructions implied that the merits of the application would be the judging factors. The terms and conditions of these proposed rules should only affect those who have filed after their official adoption by the FCC.

PP 14: Comparative hearings should be used routinely until this set or an amended set of rules is officially adopted by the FCC. If any aspect of an application can be deemed faulty by any of the other mutually exclusive applicants, it should disqualify that applicant from being considered as a potential applicant for the auction. If after all challenges there is more than one applicant remaining, an auction might be an appropriate means to resolve the conflict. To be able to apply new procedures and rules to previously pending applicants seems most unfair. If applicants performed in good faith as they certified in FCC 301, it is a reasonable expectation that the governmental agencies which specified FCC 301 as the proper form and procedure, would also in good faith adhere to the terms and conditions as specified within.

PP 15: Using auctions as routine procedure has potential to cause a significant hardship to some pending applicants. I filed my application with the understanding that there might be an auction to resolve mutually exclusive applications, but I also thought I would be able to defend my application prior to its being sent to auction. With the auction being the first step in the process, it might eliminate what could be the "best" applicant for the station only because that applicant might lack the depth of funds to survive an auction. Having to come out the successful bidder was not something I expected to have to do as I expected that the merits of my application would cause it to prevail. An additional and as yet unknown bid amount was not among the other legitimately expected and planned-for expenses. I relied on good faith that integrating preferences were not the only selecting criteria and that I would be able to provide evidence of having the strongest application.

PP 17: An auction might be the quickest way to get through the first phase of the process, but it still does not eliminate the fact that the winner has to be a sound entity. Just because an applicant has sufficient means to "buy" the C.P. does not mean that that applicant will be able to see the project through to its completion. A more complete and extensive set of criteria must be used to select who is awarded the C.P.

PP 18: To assume that someone who is able to prevail at an auction would be the one who ultimately valued it the most might not be quite accurate. Another applicant might

value it the most for a series of reasons, but that applicant might not have the fiscal means to survive the additional monetary challenge of an auction. Undertaking the task of allocating the frequency to create the "drop-in" in light of others' testimony that it could not be done, should provide some indication of how much I valued the project.

PP 19: To eliminate delays, costs and uncertainties associated with comparative hearings, rely more on the technical merits of each application as a means to eliminate what would otherwise be considered as a qualified applicant.

PP 21: Comparative hearing should be used for all cases which were accepted for filing prior to the date that this set of rules is officially adopted. If all the merits of FCC301 were given equal weight and any one inconsistency found on the application was grounds for dismissal, it would result in better and more efficient service in that any inferior application would be dismissed before it got a chance to bog down the system.

PP 22: I have expended a significant amount of resources to get to this point among which were the legal and engineering work necessary to complete the allocation requirements and the additional legal and engineering work necessary to insure an application that would meet all challenges. To propose a procedure which would render this work basically worthless without any means of compensation is unjust.

A comparative hearing should encompass all phases of the application form and their satisfactory completion at least among which should be: Timely filing in response to an announced filing window; Satisfaction of the line-of-sight requirement; Proper site acquisition from property owner whose site meets that line-of-sight requirement; Precision of technical data; Satisfaction of public notice requirements; Ability to meet financial obligations.

PP 23: In the event the Commission uses auctions, the date for the only persons eligible to be qualified bidders should be changed to reflect the official adoption date of this document. Without knowing what the criteria was that one was supposed to adhere to during the formulation and pendency of this NPRM, at least provide the privilege to all those who have endured the full brunt of FCC 301 and its requirements to be the only ones eligible to participate in the auction. The date of July 1, 1997 seems to have been set arbitrarily throughout this document and should, in all cases, be changed to reflect the date of adoption of this set of rules in order to minimize the potential hardship cases.

PP 30 & 31: Several basic qualifications of the applicants should be reviewed prior to the auction as a set of pre-qualifying criteria. All applicants should be qualified based on correctness and strength of information contained as part of FCC 301 and survival of any challenges from any of the mutually exclusive applicants. If FCC 301 and its instructions are followed completely, it affords several opportunities to help eliminate competing applications. I have also seen instances where an applicant, in disclosing other pending actions with the FCC, has listed other applications that have been filed on an almost semi-weekly basis. This applicant can have no real expectation of acquiring all these pending C.P.'s, and seems only to be able to muddy the waters in the hopes of some kind of a settlement to withdraw his application. Perhaps if a limit on the number of pending

applications any one principal applicant may be allowed were imposed, or additionally, to have applicant demonstrate ability to be able to execute financially on the total combined construction costs of all currently pending applications, other frivolous applications could be avoided.

If more detailed work were required prior to, and as part of submission requirements, it could help eliminate some potential applicants. If, upon more detailed study of the various requirements for a given site, the applicant was forced to recognize all of the potential problems at the outset of the project, that applicant might be more inclined to withdraw or not file at all. In my case, I am forced to use a site with no power and has only helicopter access in order to comply with line-of-sight requirements for the transmitter. Knowledge of information such as this would likely help deter some applicants' interest.

If FCC 301 is honestly and thoroughly done, there should be no need for any modifications to the form. If the applicant were forced to fully execute based solely on the merits of the application and full knowledge of what those merits might entail, there would be a lot fewer applicants.

PP 36, 37 & 38: To allow someone to bid on the construction permit for any form of media-transmitting station without questioning any of that applicant's qualifications is ludicrous. There must be form of preliminary qualifying criteria to be met by each applicant in order to help guarantee that applicant has sufficient technical and financial capabilities as well as use of the site for the transmitter under consideration. Satisfaction of these criteria will help insure that there will be a more smooth completion of the project.

Under proposed policy, the only necessary criteria is cash. If the FCC was originally created as a regulatory board, this switch to a board whose main concern is that of revenue generation, is a most disturbing realignment of functions. Using a financial statement as the primary criteria will not help diversify media control as is a primary Commission objective, but will ultimately result in the total elimination of the "little guy". There is now the real possibility that an auction winner had no real intention of constructing the facility, but instead intends to sell the C.P. or as a worse case, secure the permit as a means of eliminating potential competition in a market. Purchasing a C.P. with no intention of its execution might be the least expensive means of eliminating competition and monopolizing the market.

Consider the chaos if the legal and medical professions sold their licenses as the first step and that those whom these professionals were supposed to serve were forced to first consider their qualifications to provide service. The lack of qualifying criteria will do nothing but encourage unqualified applicants to participate in the process. The original intent seemed to require an informed applicant, not a wealthy one as it now seems. What is the incentive for an applicant to be fully informed prior to participating in the auction? If all the necessary preliminary work has been completed, there should be no need to allow any amendment to the application. This proposed process also introduces the possibility that a deliberately incorrect application can be first submitted and then amended to meet requirements.

If all the mutually exclusive applicants were able to challenge the merits of each of the competing applications and file motions to deny based on any inaccuracy found within that

application prior to being considered a qualified participant in the auction, many competing applications could be eliminated due to their lack of a sound framework. Follow and enforce FCC 301 and all its required testimony and assign equal weight for all the various aspects of the application. Eliminate comparative criteria or at least make its significance more proportional to the task of the entire application. Bidding credits, if used, will only be derived from some form of comparative criteria and will most likely result in a whole new round of legal challenges. Allow only those applications with sufficient technical merit and have been able to demonstrate that merit by survival of all challenges to be eligible for the auction. An uninformed auction winner will be more likely to default on the project because that business plan did not allow for a lot of the necessary contingencies. A different, more cumbersome process of dealing with partially completed, bankrupt or a technically unfeasible project must now be contemplated by the FCC. This problem also has the potential to reoccur on the same project, resulting in an endless cycle of unqualified applicants but successful bidders.

PP 42: If all pending applications were correctly filed in response to a filing window, that at the time of filing was the currently proper procedure, they should not have to endure the added hardship of additional competition. They followed proper procedure and should not be penalized for that. The potential for additional unqualified bidders to participate will only further cloud the resolution of the issues at hand. Once again, the cutoff date on which these proposed rules will take effect should, in fairness, be changed to reflect the date of the adoption of this proposed document.

PP 43 & 44: To be required to submit a short form application would not constitute a burden, but those who followed established filing procedures at the time were forced to endure a burden to properly complete the required application-FCC 301. Anyone who filed a long form in response to a filing window should not have to endure the further burden of additional applicants if another filing window were opened. Allow no further applications, rather only qualified long form applicants whose FCC 301 forms are of equal technical merit.

PP 45: Any settlement that can be arrived at prior to the use of the Commission's auction procedure should be allowed. If, after any technical challenges, a settlement can be worked out among the remaining applicants, it will only help to alleviate the current backlog of those waiting for action, as well as qualifying and potentially eliminating some pieces of the puzzle.

PP 52 & 53: The idea of those who value the project the most being able to be the ones who are also able to bid the most will not always be the case. Those who have demonstrated increased commitment to the project throughout the course of the procedure are obviously the ones who value the project the most, they just might not have as extensive a set of resources as someone who can outbid them. This is a procedure that does not afford equal opportunity to all for proper diffusion and diversification of media control, rather favors the more affluent major conglomerates which are currently exercising increased domination of the airwaves.

It seems the focus of the FCC has changed from trying to resolve competing applications to revenue generation. An auction should be held only as a last, desperate measure not as a routine operating procedure. Only hold an auction if mutually exclusive applications still exist after any and all challenges by other applicants and no other settlement arrangements can be worked out among the remaining mutually exclusive applicants within a given timeframe. A study is required among those other than legal representatives of existing licensees to be certain whether the auction procedure has resulted in any hardship eliminations for those who were ultimately unsuccessful in the auction.

PP 54: Perhaps here is where FM with its special circumstances and requirements is most arguably a category whose applicants deserve a different approach to determine mutual exclusivity. Technical and other merits are required to be able to execute the process. If a form of combinatorial bidding were used, a method must be provided to insure a single participant who is bidding on a single C.P. cannot lose his position in the process to a combination bid.

PP 56 & 57: Determining and setting an up front payment and minimum bid amount for an auction would be most contrary to the public interest in that it would favor larger corporations and their larger budgets and could effectively eliminate newcomers from entering the field. Are these expenses in addition to the application fee and necessary preliminary work and under what circumstances are they refundable? What about those who have already paid the \$2470.00 fee for FCC 301? This policy also puts the FCC in the appraisal business. What happens in an area where there are no real comps?

PP 60: As stated, none of the existing filing procedures was designed to work in conjunction with the auction of mutually exclusive applications because an auction was not considered as a viable method to resolve the problems. No applications should be accepted unless they are submitted in response to a definite filing period. If a filing window passes with no applicants, allow it to remain dark for a period of time and then renote. Allowing time for market changes in any given area might be the only catalyst needed.

This proposed procedure will only increase the number of mutually exclusive applications for any given filing window and thus result in greater numbers participating in the auction. This will result in a higher winning bid amount and further elimination of the small entity which is necessary in order to achieve maximum diversity of the airwaves.

PP 61: The FCC saw the need to impose a temporary freeze on further applications which is effective upon the release of this NPRM. If a freeze for future applicants is necessary based on the release of this NPRM it is only logical that those who were already in the process should not be bound to any of the conditions of this NPRM, only to those procedures which were in effect at the time of filing.

PP 62: Any resources expended as part of the long form process are not unnecessary and wasteful, but should be construed as only a small part of a complete business plan and expected start-up expenses. Undertaking this task at the beginning will only better enable

potential applicants to more realistically and accurately understand what will be required to complete the project and to prepare for potential problems. The expenses encountered in the filing of FCC 301 have the potential to be relatively insignificant compared to what some of the auction amounts might be.

The FCC has expressed concern about the cost of filing a long form application during the pendency of this rulemaking but does not address the issue of those who filed prior to the release date of this NPRM (11/26/97) and after the July 1, 1997 date. Certain applicants are expected to adhere to a set of rules which was not even in existence at that time they filed. Those who have already incurred the burden of filing the long form are entitled to compensation and should not be expected to adhere to the conditions of this NPRM as they completed FCC 301 in good faith with what were represented to be the existing operating procedures at the time.

The term "auction window" is used only here. Is this in addition to, or instead of, a filing window? If it is indeed instead of an auction window, it further helps illustrate the direction away from that of a regulatory board.

PP 68, 69 & 70: Pre-auction processing needs to be able to better qualify applicants and their realistic impressions of the work ahead. In addition to FCC 175, the technical information necessary to effect completion should be prepared ahead. This would not constitute any form of burden and might actually prevent burden if a bid winner does his post-auction engineering work and then finds his proposal to be unfeasible.

A pre-auction engineering review is certainly needed in the case of FM. Any deficiencies found in this part of the review of the application should result in its disqualification. Among but not limited to the qualification criteria could be: Timely filing in response to a filing window, Satisfaction of line-of-sight requirement, Ability to acquire that site, Precision of technical data, Satisfaction of public notice requirements. The proposed procedure not to review applications except to decide mutual exclusivity could result the auction winner not having the technical merits to fully execute the project resulting in the possibility for repeated auctions for the same C.P.

As part of the pre-auction review, allow all mutually exclusive applicants file petitions to deny a competing application if sufficient deficiencies of technical merit or other required aspects are found within that application. Throughout the process of the allocation and now the application for the C.P., I was informed that I was expected to meet the requirements of FCC 301 to the letter of the law and that lack of satisfaction of any requirement could result in the ultimate dismissal of my application. Yet I find myself in a position where all of the other mutually exclusive applications have a flaw of one kind or another, a flaw that I was under the impression could result in my disqualification if I were to make the error. The rules and instructions on an official U.S. Government document (FCC 301) will be rendered as being useless during the time that it was the supposed to be the proper document, if the proposed set of rules is allowed to be adopted as it is now stands.

PP 73: The removal of competing applications should be encouraged at any time throughout the process. Being able to reach a settlement agreement between competing applicants will only help to free up the Commission's affairs and prevent a backlog of

cases. To hold an auction in the case where a settlement could otherwise be arrived at, is only a means of generating revenue and not in the best public interest.

PP 76, 77 & 78: A period of 30 days is more than sufficient to prepare a long form, especially if all required engineering work is done ahead. What is the vehicle by which other non-winners will be informed as to the validity of the bid-winner's application and be given the opportunity to file a petition to deny? The requirements of the auction and the lack of the need for engineering work to be done in advance by all applicants, will result in a lesser ability of other applicants to question the merits of FCC 301 of the bid winner and therefore be unable to file what may be a valid petition to deny. The ability to compare engineering data would serve as a system of checks and balances regarding the design standards of any applicant.

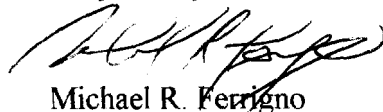
A five day notice is insufficient in order to prepare and file a petition to deny. If engineering work is not done in advance, it does not afford any of those who might wish to challenge technical data enough time to do the necessary research.

If FCC 301 instructions were explicitly followed and enforced and design criteria required, there should be no questions relating to a technical proposal and therefore no changes necessary. Once the form is submitted, no significant changes should be allowed or it would result in its disqualification. Fictitious, inaccurate (deliberate or not) data could be submitted up to this point with no means for other mutually exclusive applicants to effectively challenge the data.

PP 81: Ability of the applicant to secure a reasonable assurance of the use of a site may be the most important aspect leading to the completion of the project. Throughout the rules and regulations, it seems that flat terrain is assumed. In mountainous terrain, as long as line-of-sight is still a required criteria, inability to secure the site could pose real problems. In my situation, I have secured the only site which meets the line-of-sight requirement. In this case, the terrain prohibits multiple sites from satisfying the line-of-sight requirement. In such instances, lack of advance permission from the sole property owner whose land can satisfy this requirement could result in the bid-winner's inability to perform. Reasonable assurance of the use of a valid site could be one of the most important criteria for the completion of construction and lack of it could result in the total failure of the project.

PP 92: The potential for large group owners to prevail over newcomers to the field is very real, thus resulting in lack of diversification of ownership. The use of bidding credits or any other form of preferential treatment will only be challenged in the courts and should not be relied on as a means to settle the issue. Refine, strengthen and adhere to the existing criteria and enforce them as a routine part of determining a valid application.

Respectfully submitted,



Michael R. Ferrigno